CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 426

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA, PETITIONER,

vs.

EISENBERG FARM PRODUCTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED OCTOBER 18, 1938.

CERTIORARI GRANTED NOVEMBER 21, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No.

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA, PETITIONER,

vs.

EISENBERG FARM PRODUCTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

INDEX.

	Original	Print
Proceedings in Supreme Court of Pennsylvania	a	1
Praecipe for transcript of record	a	1
Docket entries	1	2
Entry of appeal	2	2
Notice of appeal	3	3
Assignments of error	4	3
Record from Court of Common Pleas of Dauphin County	9	6
Docket entries	9	6
Bill of complaint	10	7
Rule to show cause	13	8
Injunction affidavits:		
Affidavit of Norman W. Lyon	14	9
Earl W. Maxwell	16	10
Answer to bill of complaint	18	11
Agreed statement of case	21	13
Adjudication and decree	25	15
Statement of pleadings	25	15
Findings of fact	25	16
Discussion	28	17
Conclusions of law	37	23
Decree	37	24

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	Original	Print
Record from Court of Common Pleas of Dauphin County—Continued.		
Stipulation re time for filing exceptions	38	24
Order extending time for filing exceptions	39	25
Plaintiff's exceptions to adjudication and decree	39	25
Opinion on exceptions	41	26
Opinion, Kephart, J.	49	32
Petition for rehearing and reargument	52	34
Order denying reargument	61	40
Petition to hold record pending appeal	62	41
Order holding record	64	42
Petition to extend time for holding record	65	42
Order extending time for holding record	67	43
Certificates to record (omitted in printing)	68	
Order allowing certiorari	69	43

[fol. a]

IN SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

MAY TERM, 1938

No. 22

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA, Appellant,

vs.

EISENBERG FARM PRODUCTS, a Pennsylvania Corporation, Appellee

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Prothonotary of the Supreme Court of Pennsylvania:

In making up the transcript for transmission to the United States Supreme Court in the above entitled cause, you will incorporate the following:

Docket entries.
Appeal and affidavit.
Notice of appeal etc.
Assignments of error.
Record—Court of Common Pleas of Dauphin County.
Opinion by Kephart, C. J. Supreme Court.
Petition for Rehearing and Reargument.
Order denying reargument.
Petition to hold record pending appeal to Supreme Court of the United States.
Order holding record.
Petition to extend time for holding record, etc.
Order extending time for holding record.
Praecipe indicating portions of record to be incorporated into transcript, with service thereof.

(Signed) Harry Polikoff, Counsel for Appellant.

Service of copy of the above Praecipe is hereby acknowledged this 13th day of October, 1938.

(Signed) Caldwell, Fox & Stoner, Counsel for Appellee. M. Yoffee.

[fol. 1] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

(Appeal of Milk Control Commission of the Commonwealth of Pennsylvania, Plaintiff, from the decree)

DOCKET ENTRIES—Filed December 17, 1937

Eo die Certiorari exit.
Returnable 21st Monday of the year.
Jan. 12, 1938. Notice of Appeal, etc. filed.
May 13, 1938. Assignments of Error filed.
May 13, 1938. Praecipe for appearance entered by Guy K. Bard, Attorney General, for Appellant.
May 18, 1938. Record returned and filed.
May 23, 1938. Continued at bar, to be heard June 17, 1938 at Phila.
May 31, 1938. Certificate of Transfer exit to Phila.
June 17, 1938. Argued in Phila.
June 30, 1938. "Decree affirmed at appellant's cost. Kephart, C. J."
July 11, 1938. Petition for Reargument filed. Harry Polikoff.
July 25, 1938. Reargument refused. Per Curiam.
July 26, 1938. Petition to hold record pending appeal to the Supreme Court of United States filed. Harry Polikoff.
July 29, 1938. Petition granted for period of thirty days.
Sept. 1, 1938. Petition to extend time for holding record pending appeal, etc., filed. Chas. J. Ware, Asst. Dep. Atty. Gen.
Sept. 1, 1938. Petition granted for additional sixty days.

Charles J. Margiotti, Harry Polikoff, Chas. J. Ware, Attorneys for Appellant. Caldwell, Fox & Stoner, Attorneys for Appellee.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 2] IN SUPREME COURT OF PENNSYLVANIA

ENTRY OF APPEAL

Enter appeal on behalf of Milk Control Commission of the Commonwealth of Pennsylvania, from the decree of the

Court of Common Pleas of the County of Dauphin Returnable.

Harry Polikoff, Attorney for Appellant.

To Paul W. Orth, Prothonotary

SUPREME COURT, MIDDLE DISTRICT

COUNTY OF DAUPHIN, ss:

Harry Polikoff, being duly sworn saith that said Appeal is not taken for the purpose of delay, but because Appellant believes it has suffered injustice by the Decree from which it appeals and subscribed, this — day of December A. D. 1937.

Harry Polikoff.

[fol. 3] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

NOTICE OF APPEAL

To the appellee or his Counsel:

You are hereby notified that on December 17, 1937, an appeal was taken to the above court in the above-entitled case.

Harry Polikoff, Attorney for Appellant.

January 12, 1938, Service of the foregoing notice is hereby accepted; and the Prothonotary of the above court is directed to enter the appearance of the undersigned for the appellee.

Caldwell, Fox & Stoner.

[fol. 4] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ASSIGNMENTS OF ERROR

And Now, comes the appellant in the above captioned case and makes the following assignments of error:

1. The learned Court below erred in overruling the plaintiff's exception to the Chancellor's first conclusion of law, which exception and ruling thereon are as follows (a, a):

"1. Plaintiff excepts to the learned chancellor's first conclusion of law, which reads:

" '1. All of the transactions of the defendant including the purchase of milk from the Pennsylvania farmer-pro-

ducers, within the Commonwealth of Pennsylvania, constitute interstate commerce.' "

Ruling:

"And now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc.

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

2. The learned Court below erred in overruling the plaintiff's exception to the Chancellor's second conclusion of law, which exception and ruling thereon are as follows (a, a):

[fol. 5] "2. Plaintiff excepts to the learned chancellor's second conclusion of law, which reads:

" '2. The regulations sought to be imposed upon the defendant by the plaintiff, including the taking out of a license as provided by the Act of April 26, 1937, posting a bond conditioned for the payment of all amounts due to farmers under the Act and under orders of the Milk Control Commission, and to pay such milk prices to the farmers as is required by the Commission would constitute a regulation of and a burden upon interstate commerce.' "

Ruling:

"And now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc:

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

3. The learned Court below erred in overruling the plaintiff's exception to the Chancellor's third conclusion of law, which exception and ruling thereon are as follows (a, a):

"3. Plaintiff excepts to the learned chancellor's third conclusion of law, which reads:

" '3. The defendant, in its operations as described in the Case Stated, is not subject to the jurisdiction or con-

trol of the Milk Control Commission of the Commonwealth of Pennsylvania in the matters complained of by the plaintiff.' "

Ruling:

"And now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc:

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

[fol. 6] 4. The learned Court below erred in overruling the plaintiff's exception to the decree nisi, which exception and ruling thereon are as follows (a, a):

"4. Plaintiff excepts to the learned chancellor's decree nisi, which is as follows:

" 'And Now, August 23rd, 1937, upon consideration of the foregoing case, it is ordered, adjudged and decreed that judgment therein shall be entered in favor of the defendant as stipulated in the Case Stated, and that the plaintiff's bill of complaint be and the same is hereby dismissed at the cost of the plaintiff.' "

Ruling:

"And now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc:

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

[fols. 7-8] 5. The learned Court below erred in entering the following final decree (a, a):

"And Now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc:

W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding."

Respectfully submitted, Guy K. Bard, Attorney General; Harry Polikoff, Deputy Attorney General; Charles J. Ware, Assistant Deputy Attorney General, by Harry Polikoff.

[fol. 9] In Court of Common Pleas of Dauphin County

Docket Entries

August 21, 1936. Bill and Injunction Affidavits filed, same day rule granted on the defendant to show cause why a preliminary injunction should not issue as prayed, returnable September 2, 1936.

August 22, 1936. Issuance of Rule waived and service accepted by Caldwell, Fox and Stoner, attorney- for the defendant. See file.

September 9, 1936. Answer to Bill of Complaint filed, same day service accepted by Harry Polikoff, attorney for the Milk Control Board.

December Term 1936, argument list December 10, 1936 continued January Term 1937, argument list.

February 11, 1937. Case Stated, see file.

August 23, 1937. It is ordered, adjudged and decreed that judgment therein shall be entered in favor of the defendant as stipulated in case stated and that plaintiff's Bill of Complaint be and the same is hereby dismissed at the cost of the plaintiff. It is further ordered that the prothonotary shall enter above decree nisi and give notice of entry thereof to parties and if no exceptions be filed thereto by either party within ten days after such notice is given the decree entered nisi shall be entered as an absolute decree, see decree filed.

August 31, 1937. Stipulations of counsel filed extending the time to file exceptions to the adjudication and decree of court to September 20, 1937. See file.

[fol. 10] September 20, 1937. Plaintiff's exceptions to adjudication and decree filed. October Term 1937 argument list.

December 7, 1937. Plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree. See opinion file.

December 7, 1937. Exception to the final decree is noted for plaintiff, see file.

January 12, 1938. Certiorari from Supreme Court to No. 22 May Term 1938 filed.

In Court of Common Pleas of Dauphin County

Bill of Complaint

Howard C. Eisaman, Howard C. Reynolds and John J. Snyder, constituting the Milk Control Board of the Commonwealth of Pennsylvania, orators herein, do complain and say:

1. Eisenberg Farm Products, a Pennsylvania corporation, is a milk dealer engaged in the business of buying and selling milk in and about Elizabethville, County of Dauphin, Commonwealth of Pennsylvania.

2. Said milk dealer does not have a license to do business as a milk dealer in the Commonwealth of Pennsylvania, and has been operating without such license since May 1, 1935.

3. Said milk dealer does not have on file with the Commonwealth, and never has filed, the bond required by law [fol. 11] for the protection of milk producers from whom the said dealer purchases milk.

4. Said milk dealer is unlawfully paying to milk producers prices below the minimum prescribed in the official general orders of the Milk Control Board, and never has paid to milk producers prices at or above the minimum so prescribed; true and correct copies of said orders are attached hereto, made part hereof, and marked Exhibit "A."

5. Said milk dealer does not file the reports, and does not keep the records, required by the official general orders of the Milk Control Board, and never has filed such reports or kept such records.

6. The said milk dealer unlawfully has failed and refused, and continues to fail and refuse, to comply with the Milk Control Board Law and with the rules, regulations and official general orders of the Milk Control Board, in each of the aforesaid particulars.

7. Such continuing violations of law by said milk dealer undermine the price structure of dairy farmers in the Commonwealth, causing irreparable injury.

8. Such continuing violations of law by said milk dealer prevent its milk producers from securing the cost of sani-

tary production for their milk and tend to lower the sanitary quality of the milk sold to consumers by said dealer, causing irreparable injury.

9. No remedy at law is adequate to halt said illegal practices in order to protect the public health and interest herein, [fol. 12] and to prevent the irreparable injury aforesaid.

Wherefore your orators pray equitable relief as follows:

1. That an injunction may issue preliminary until hearing, and perpetual thereafter, restraining the said dealer, its officers, agents, employes, assigns, from purchasing or handling milk for sale, processing or manufacture, and from otherwise dealing in milk.

2. Such other further relief as the equity in this case may require, and as to your Honorable Court seems proper.

Charles J. Margiotti, Attorney General. Harry Polikoff, Deputy Attorney General.

Duly sworn to by Edwin H. Ridgway. Jurat omitted in printing.

[fol. 13] In Court of Common Pleas of Dauphin County

Rule to Show Cause

And Now, to wit, the 21st day of August, 1936, upon motion of Charles J. Margiotti, Attorney General, and Harry Polikoff, Deputy Attorney General, attorneys for the Milk Control Board of the Commonwealth of Pennsylvania, a rule is issued directing Eisenberg Farm Products, a Pennsylvania corporation, to show cause why a preliminary injunction should not issue restraining the said Eisenberg Farm Products, its officers, agents, employes and assigns, from purchasing or handling milk for sale, process or manufacture, and from otherwise dealing in milk in the Commonwealth of Pennsylvania.

Returnable the 2nd day of September, 1936.

Fred S. Reese, P. J., 9th Judicial District, Specially Presiding.

[fol. 14] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

Injunction Affidavits

AFFIDAVIT OF NORMAN W. LYON

Norman W. Lyon, Secretary of the Milk Control Board of the Commonwealth of Pennsylvania, being duly sworn according to law, deposes and says:

1. Eisenberg Farm Products, a Pennsylvania corporation, is a milk dealer engaged in the business of buying and selling milk in and about Elizabethville, County of Dauphin, Commonwealth of Pennsylvania.

2. Said milk dealer does not have, and never has had, a license to do business as a milk dealer in the Commonwealth of Pennsylvania, as required by law, since May 1, 1935.

3. Said milk dealer does not have on file with the Commonwealth, and never has filed, the bond required by law for the protection of milk producers from whom the said dealer purchases milk.

4. Said milk dealer is unlawfully paying to milk producers, prices below the minimum prescribed in the official general orders of the Milk Control Board, and never has paid to milk producers, prices at or above the minimum so prescribed.

5. Said milk dealer does not file the reports, and does not keep the records, required by the official general orders of the Milk Control Board, and never has filed such reports or kept such records.

[fol. 15] 6. The said milk dealer unlawfully has failed and refused, and continues to fail and refuse, to comply with the Milk Control Board Law and with the rules, regulations and official general orders of the Milk Control Board, in each of the aforesaid particulars.

7. Such continuing violations of law by said milk dealer undermine the price structure of dairy farmers in the Commonwealth, causing irreparable injury.

8. Such continuing violations of law by said milk dealer prevent its milk producers from securing the cost of sanitary production for their milk and tend to lower the sani-

tary quality of the milk sold to consumers by said dealer, causing irreparable injury.

9. No remedy at law is adequate to halt said illegal practices in order to protect the public health and interest herein, and to prevent the irreparable injury aforesaid.

All of which your deponent avers to be true and correct to the best of his knowledge, information and belief.

Norman W. Lyon.

Sworn to and subscribed before me this 17th day of August, 1936. Miss Lucille A. Stroup, Notary Public. My commission expires March 5, 1939. (Seal.)

[fol. 16] AFFIDAVIT OF EARL W. MAXWELL

Earl W. Maxwell, Assistant Director of the Bureau of Audits and Investigations of the Milk Control Board of the Commonwealth of Pennsylvania, being duly sworn according to law, deposes and says:

1. Eisenberg Farm Products, a Pennsylvania corporation, is a milk dealer engaged in the business of buying and selling milk in and about Elizabethville, County of Dauphin, Commonwealth of Pennsylvania.

2. Said milk dealer does not have, and never has had, a license to do business as a milk dealer in the Commonwealth of Pennsylvania, as required by law, since May 1, 1935.

3. Said milk dealer does not have on file with the Commonwealth, and never has filed, the bond required by law for the protection of milk producers from whom the said dealer purchases milk.

4. Said milk dealer is unlawfully paying to milk producers prices below the minimum prescribed in the official general orders of the Milk Control Board, and never has paid to milk producers prices at or above the minimum so prescribed.

5. Said milk dealer does not file the reports, and does not keep the records, required by the official general orders of the Milk Control Board, and never has filed such reports or kept such records.

[fol. 17] 6. The said milk dealer unlawfully has failed and refused and continues to fail and refuse, to comply with the Milk Control Board Law and with the rules, regulations and official general orders of the Milk Control Board, in each of the aforesaid particulars.

7. Such continuing violations of law by said milk dealer undermine the price structure of dairy farmers in the Commonwealth, causing irreparable injury.

8. Such continuing violations of law by said milk dealer prevent its milk producers from securing the cost of sanitary production for their milk and tend to lower the sanitary quality of the milk sold to consumers by said dealer, causing irreparable injury.

9. No remedy at law is adequate to halt said illegal practices in order to protect the public health and interest herein, and to prevent the irreparable injury aforesaid.

All of which your deponent avers to be true and correct to the best of his knowledge, information and belief.

Earl W. Maxwell.

Sworn to and subscribed before me this 17th day of August, 1936. Miss Lucille A. Stroup, Notary Public. My commission expires March 5, 1939. (Seal.)

[fol. 18] In Court of Common Pleas of Dauphin County

Answer to Bill of Complaint

And Now, comes Eisenberg Farm Products, a Pennsylvania corporation, defendant in the above entitled action, and makes answer to the bill of complaint as follows:

1. Denied. The defendant is engaged in the business of buying milk at its Elizabethville plant, but said milk is sold in New York State and constitutes interstate commerce.

2. Admitted, but defendant avers that inasmuch as it is engaged solely in interstate commerce, it is not required to obtain a license in the Commonwealth of Pennsylvania.

3. Admitted, for the reason that it is engaged in interstate commerce and hence is not required to file said bond.

4. Denied. Defendant avers that it is paying fair, just and satisfactory prices to its farmers, with which they are well satisfied. Defendant is unable to state whether or not it is paying the prices prescribed in the official general orders of the Milk Control Board, because it is not aware of the disposition of the milk sold by it in New York State and further avers that its purchasers in New York State are not obligated to advise the defendant of the disposition of the milk sold to the said purchasers because they are not subject to regulation by the Pennsylvania Milk Control Board. Since the Milk Control Board price is regulated by the ultimate disposition of the milk, defendant, as above [fol. 19] stated, cannot obtain the information necessary to answer this allegation.

5. Defendant does not file the reports and does not keep the records referred to in this allegation, because it has no way of obtaining the information necessary to compile said reports since the milk is disposed of without the Commonwealth of Pennsylvania and the purchasers are not obligated and refuse to furnish information as to its disposition.

6. Defendant denies these allegations generally and says that it is doing all it is required to do since it is engaged in interstate commerce and is not subject to the regulations and control of the Milk Control Board.

7. Denied. Defendant avers that prices paid by it to its farmers are entirely satisfactory to the said farmers and cause no injury to anyone.

8. Denied. Defendant avers that its prices paid to its producers are entirely adequate to permit them to secure the cost of sanitary production and further denies that the sanitary quality of the milk is lowered in any way.

9. Denied. Defendant avers that plaintiff has already instituted a criminal prosecution against defendant, which action is now pending before your Honorable Court and further avers that no irreparable injury exists. Defendant further avers that the public health and interest is not in any way endangered and proof thereof is demanded if material.

[fol. 20] Wherefore, defendant prays that the bill be dismissed at the cost of the plaintiff.

And it will ever pray.

Eisenberg Farm Products, a Pennsylvania Corporation, (S.) by Samuel Kamphy, President.

Duly sworn to by Samuel Kamphy. Jurat omitted in printing.

[fol. 21] In Court of Common Pleas of Dauphin County

Agreed Statement of Case

The parties to this Case Stated, by their attorneys, agree to the following facts:

1. The plaintiff is the Milk Control Board of the Commonwealth of Pennsylvania.

2. The defendant is a Pennsylvania corporation.

3. The defendant leases from the Daubert Realty Company a milk receiving plant in Elizabethville, Pennsylvania.

4. The defendant buys milk from farmers at the aforesaid plant in Elizabethville, Pennsylvania.

5. The milk is brought to the plant by the farmers in their own cans, at which point it is weighed and tested by the defendant.

6. At the plant the milk is dumped into receiving tanks. In these tanks the milk is cooled down to approximately 32° to 35°, but is not processed in any way whatever.

7. The cooling aforesaid is not for the purpose of changing the milk or its constituent parts in any manner whatever, but is done for the sole purpose of preventing the growth of bacteria during shipment of the milk and thereafter.

8. The milk hereinbefore referred to is retained in the Elizabethville plant for a period of less than twenty-four hours, and is thereupon immediately shipped to New York [fol. 22] City, New York State, in tank trucks operated for the defendant, for resale in said city.

9. The journey of these tank trucks is continuous from Elizabethville, Pennsylvania, to New York City, New York.

10. None of the milk purchased from the defendant corporation at its Elizabethville plant as aforesaid, is sold within the Commonwealth of Pennsylvania, but all of it is sold as heretofore stated, in the state of New York.

11. Approximately ten thousand quarts of milk are received each day from approximately one hundred and seventy-five farmers, resident in the State of Pennsylvania.

12. Approximately 4,500,000,000 pounds of milk were produced in Pennsylvania in 1934. Of this amount, approximately 470,000,000 pounds were shipped to other states. The relationship of these amounts has not altered materially since 1934, although slightly more milk is being shipped from Pennsylvania to New York at present.

13. Defendant has been doing business at Elizabethville, Pennsylvania, in the manner indicated, for a period of more than three years.

14. The plaintiff has attempted to apply the provisions of the Milk Control Board Law, 1935, P. L. 96, to the defendant corporation, by requiring it to take out a license as a milk dealer as defined in said Act, post a bond conditioned [fol. 23] for the payment of all amounts due to farmers under the Act and orders of the Board, and to pay such milk prices to the farmers as is required by the Board.

15. The defendant has refused to do any of the things enumerated in the preceding paragraph, advancing the following arguments in support of its position:

(a) It is engaged in interstate commerce purely, and is not subject to the control of the Pennsylvania Milk Board because the requirements of the Board as hereafter enumerated would constitute a burden upon interstate commerce.

(b) The license fees required by the Board would constitute a burden upon interstate commerce.

(c) The cost of procuring bond, which, however, the company is unable to do, would constitute a burden upon interstate commerce.

(d) The orders of the Board establishing prices to be paid by the defendant to the farmers would constitute a burden upon interstate commerce because such prices are

in excess of the prices for which the aforesaid farmers are now and have been selling their milk to the defendant.

The following questions are, therefore, submitted for the determination of your Honorable Court:

1. Is the defendant wholly engaged in interstate commerce?

[fol. 24] 2. Is the defendant, under the circumstances above set forth, required to take out a license as a milk dealer within the provisions of the Act as hereinbefore referred to, and generally comply with the provisions of the said Act or any part thereof (including the orders issued thereunder)?

If the Court shall be of the opinion that the defendant is engaged in interstate commerce and is not required to take out a license or otherwise comply with said Act, then the Court is respectfully requested to enter judgment in favor of the defendant. If the Court shall be of the opinion that the defendant is not engaged in interstate commerce, or is required to take out a license or otherwise comply with the said Act, then the Court is respectfully requested to enter judgment in favor of the plaintiff.

Each party reserves the right of appeal.

Harry Polikoff, Attorney for Plaintiff. Caldwell, Fox, Stoner, Attorneys for Defendant.

[fol. 25] In Court of Common Pleas of Dauphin County

Adjudication and Decree

Statement of Pleadings

This case arose originally upon a bill of complaint filed by the Commonwealth, praying that a preliminary injunction issue restraining the defendant corporation from doing business in the Commonwealth of Pennsylvania. Injunction affidavits were filed in support of the bill. The plaintiff and the defendant agreed to a "Case Stated" under Equity Rule 32, upon which argument was held as upon a final hearing.

The Case Stated eliminated any issues of fact, and raised only questions of law which were thereby submitted to the Court for determination.

Based on the Case Stated filed the Court makes the following

FINDINGS OF FACT

1. The plaintiff is the Milk Control Board of the Commonwealth of Pennsylvania, now the Milk Control Commission of the Commonwealth of Pennsylvania.

2. The defendant is a Pennsylvania corporation.

3. The defendant leases from the Daubert Realty Company, a milk receiving plant in Elizabethville, Pennsylvania.

4. The Defendant buys milk from farmers at the aforesaid plant in Elizabethville, Pennsylvania.

[fol. 26] 5. The milk is brought to the plant by the farmers in their own cans, at which point it is weighed and tested by the defendant.

6. At the plant the milk is dumped into receiving tanks, In these tanks the milk is cooled down to approximately 32° to 35°, but is not processed in any way whatever.

7. The cooling aforesaid is not for the purpose of changing the milk or its constituent parts in any manner whatever, but is done for the sole purpose of preventing the growth of bacteria during shipment of the milk and thereafter.

8. The milk hereinbefore referred to is retained in the Elizabethville plant for a period of less than twenty-four hours, and is thereupon immediately shipped to New York City, New York State, in tank trucks operated for the defendant, for resale in said city.

9. The journey of these tank trucks is continuous from Elizabethville, Pennsylvania, to New York City, New York.

10. None of the milk purchased from the defendant corporation at its Elizabethville plant as aforesaid, is sold within the Commonwealth of Pennsylvania, but all of it is sold as heretofore stated, in the State of New York.

11. Approximately ten thousand quarts of milk are received each day from approximately one hundred and sev-

[fol. 27] enty-five farmers, resident in the State of Pennsylvania.

12. Approximately 4,500,000,000 pounds of milk were produced in Pennsylvania in 1934. Of this amount, approximately 470,000,000 pounds were shipped to other states. The relationship of these amounts has not altered materially since 1934, although slightly more milk is being shipped from Pennsylvania to New York at present.

13. Defendant has been doing business at Elizabethville, Pennsylvania, in the manner indicated, for a period of more than three years.

14. The plaintiff has attempted to apply the provisions of the Milk Control Board law, 1935 P. L. 96, to the defendant corporation, by requiring it to take out a license as a milk dealer as defined in said Act, post a bond conditioned for the payment of all amounts due to farmers under the Act and orders of the Board, and to pay such milk prices to the farmers as is required by the Board.

15. The defendant has refused to do any of the things enumerated in the preceding paragraph, advancing the following arguments in support of its position:

(a) It is engaged in interstate commerce purely, and is not subject to the control of the Pennsylvania Milk Board because the requirements of the Board as hereafter enumerated would constitute a burden upon interstate commerce.

[fol. 28] (b) The license fees required by the Board would constitute a burden upon interstate commerce.

(c) The cost of procuring bond, which, however, the company is unable to do, would constitute a burden upon interstate commerce.

(d) The orders of the Board establishing prices to be paid by the defendant to the farmers would constitute a burden upon interstate commerce because such prices are in excess of the prices for which the aforesaid farmers are now and have been selling their milk to the defendant.

Discussion

The Case Stated submitted the following questions for the determination of the Court:

1. Is the defendant wholly engaged in interstate commerce?

2. Is the defendant, under the circumstances above set forth, required to take out a license as a milk dealer within the provisions of the Act known as the Milk Control Board Law, approved April 30, 1935, P. L. 96 (reenacted by the Act of April 28, 1937), and generally comply with the provisions of said Act or any part thereof including the orders issued thereunder?

It was stipulated that if the Court should be of the opinion that the defendant is engaged in interstate commerce and is not required to take out a license or otherwise comply with the Act, judgment should be entered in favor of the defendant. If the Court should be of the opinion that the defendant is not engaged in interstate commerce, or is [fol. 29] required to take out a license or otherwise comply with said Act, judgment is to be entered in favor of the plaintiff.

In the present case, the defendant operates a milk-receiving plant at which it buys milk brought to the plant by the farmer-producers. The milk is weighed and tested by the defendant and is then dumped into receiving tanks where it is cooled for the sole purpose of preventing growth of bacteria during shipment. Within a period of twenty-four hours after the milk is received at the plant it is shipped to New York City in tank trucks operated for the defendant for resale in that city.

The plaintiff bases its right to require the defendant to secure a license and to submit to its regulations solely on the ground that the contract between the Pennsylvania farmers and the defendant, a Pennsylvania corporation, consists of an offer and an acceptance, both made in Pennsylvania, which contract is completely performed by both parties within the Commonwealth of Pennsylvania, and is entirely an intrastate transaction. The defendant admits the right of the plaintiff to control the production of the milk. The plaintiff concedes that it has no right to control the milk after it has started its journey to New York, so that the sole question before us is whether the act of purchasing milk in Pennsylvania under the circumstances of this case can be so separated from the transportation of the milk to New York as to constitute a separate transaction, purely intrastate in its nature.

The courts have frequently recognized that a business [fol. 30] may consist of two activities, one intrastate and one

interstate. Thus, in Utah Power & Light Company v. Pfest, 286 U. S. 165 (1931) it was held that the production of electrical energy was intrastate while the transmission of that energy into other states was interstate. Also, in Champlin Refining Company v. Corporation Commission, 286 U. S. 210 (1931) it was held that oil production was intrastate while the shipping of oil to other states was interstate. Again, in United States v. Butler, 297 U. S. 1 (1935) it was held that agricultural production was exclusively a matter of state regulation, notwithstanding the subsequent shipment of that commodity in interstate commerce.

More recently, in Carter v. Carter Coal Company, 298 U. S. 238 (1936), the Supreme Court of the United States, referring to the mining of coal, said: "so far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. • • • Mining brings the subject matter of commerce into existence. Commerce disposes of it."

The doctrine of these cases, relied upon by the plaintiff, as applied to the present situation would be that the "production" of milk by the farmers is a matter of local concern, a theory admitted by the defendant. These cases do not fix the exact point at which the transaction becomes interstate in its nature.

We do not believe that the making of the contract for the purchase of the milk can be so separated from the entire transaction as to subject to local regulation without affecting the interstate business. The facts in the present case [fol. 31] are nearly identical with the facts presented in the case of Lemke v. Farmers' Grain Co., 258 U. S. 50 (1921). In that case the defendant was the owner of a grain elevator in the state of North Dakota. It purchased grain at its elevator to be shipped to and sold in markets in other states. After the grain was purchased from the farmer in North Dakota it was placed in the elevator for shipment and was loaded at once upon cars for shipment to places outside the state of North Dakota. The Court there said: "That such course of dealing constitutes interstate commerce, there can be no question." The Court pointed out the distinction between that case and the cases in which it had occasion to define the line between state and Federal authority where the right of state taxation was involved,

and cases where manufacture or commerce of an intrastate nature was the subject of consideration.

The Court in the Lemke case used the following language which effectively disposes of the argument here made by the plaintiff that after the purchase of the milk the defendant could do with it what it pleased and was not bound to ship it to another state. The Court said: "It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions." In the present case the agreed statement of facts stipulate that "none [fol. 32] of the milk purchased by the defendant corporation at its Elizabethville plant as aforesaid, is sold within the Commonwealth of Pennsylvania, but all of it is sold as heretofore stated in the State of New York."

In a similar case, involving practically the same facts, the Court said: "Buying for shipment, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce,—the buying being as much a part of it as the shipping." Shafer v. Farmers Grain Co., 268 U. S. 189 (1924).

The same rule is expressed in United States v. Seven Oaks Dairy Co., 10 F. Supp. 995 (1935) by Judge Brewster of the District Court of Massachusetts in a case brought by the United States against the Company seeking to restrain it from engaging in the milk business because of its refusal to comply with a federal milk license. The defendant purchased all of its milk in Vermont with the intention of shipping it into Massachusetts. The milk produced in Vermont was delivered to the Company's receiving station in Vermont and was then dumped, tested, weighed and cooled. The milk was then placed in cans and shipped into Massachusetts within forty-eight hours after its receipt by the Company. The Court said: "It is settled law that the purchase of a commodity in one state for the purpose of transporting it to another state is a transaction in interstate commerce within the Commerce Clause of the Constitution and not subject to burdens imposed by state regulations. • • • The purchase is none the less a part of the interstate com-

merce because of the method of receiving deliveries adopted by the defendants. The intermediate deliveries by the pur-
[fol. 33] chasers to the defendant's receiving station did not end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination."

Under the authority of these cases we are of the opinion that the entire activity of the defendant as set forth in the Case Stated constituted interstate commerce and that for the purpose of regulation, the purchase of the milk cannot be separated from its transportation.

The plaintiff insists, however, that even if the defendant is engaged in interstate commerce it is required to secure a license from the plaintiff and to post a bond with the Commonwealth as collateral security for the payment of milk purchased and to pay purchasers certain minimum prices under the regulations and control of the plaintiff, on the theory that such regulation by the state is a valid exercise of its police power, and that such power rises above the right of the Federal Government to control interstate commerce, or, at least, exists until the Federal Government exercises some control over the subject matter.

The case of Townsend v. Yeomans, reported in the Advance Opinions of the Lawyers Edition of the United States Supreme Court Reports, Vol. 81, No. 16, page 840, is strongly relied upon by the plaintiff as authority for the proposition that where a matter admits of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act. This, however, does not permit a state to regulate or to place a burden upon interstate commerce, and the Court clearly indicated that the state
[fol. 34] statute there under consideration did not impose such burden. The Court said (page 847): "We find no ground for concluding that the state requirements lay any actual burden upon interstate or foreign commerce. The Georgia Act does not attempt to fix the prices at auction sales or to regulate the activities of the purchasers. The fixing of reasonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy. They pay the bid price, as accepted, and the warehousemen pays the seller, deducting from the purchase price the warehouse charges."

This quotation clearly differentiates Townsend v. Yeomans from the present case. Here, if the defendant is subject to the control of the plaintiff, it would be required to pay the milk producers not the agreed price, but the price fixed by the plaintiff. It would also be required to post a bond to secure payment to the producers of the prices fixed by the plaintiff and would be required to pay license fees. The cost of the milk to it would be increased by the premium on the bond, by the license fee, and by the increase in price ordered by the plaintiff. The effect of such regulation and such price fixing would be exactly equivalent to the imposition of a tax on the export of milk.

The regulation here sought to be imposed is very similar to the regulation sought to be imposed in Lemke v. Farmers' Grain Co., 258 U. S. 50; 66 L. Ed. 458 (1921) supra. There, after outlining the control to be exercised under the State Act the Court said: "That is, the state officer may fix and determine the price to be paid for grain which is bought, [fol. 35] shipped and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement."

Again, in Shafer v. Farmers Grain Co., 268 U. S. 189; 69 L. Ed. 909 (1924) supra, the state statute required every buyer to give to the state a bond securing payment for all wheat purchased on credit, to keep records of his transactions, and to furnish such data to the state authorities. It also required a state supervisor to investigate and supervise the marketing of grain for the purpose of preventing various things which were deemed unjust and fraudulent, and authorized him to make rules and regulations to carry out the provisions of the Act. The Court said (page 915): "We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause."

The plaintiff seeks to distinguish these North Dakota grain cases on the ground that in North Dakota 90% of the wheat produced was sold in other states whereas only 10% of the milk produced in Pennsylvania is so sold. Undoubtedly, the laws of Pennsylvania relating to milk control were not enacted for the primary purpose of regulating

interstate commerce, but if they have that effect they are invalid as applied to such interstate commerce regardless of the proportion which such commerce bears to the total commerce of the state. Nor do we agree that these cases have been overruled by Townsend v. Yeomans, supra, as the [fol. 36] Court in that case carefully distinguishes the North Dakota Grain cases.

The plaintiff further calls our attention to Section 808 of Act No. 105 approved April 28, 1937, wherein it is declared to be the legislative intent that the prices prescribed by the Commission for milk produced in this Commonwealth and sold in this Commonwealth for shopment into and sale in another state shall not be destructive of the price structure of producers in such other state. The effect of price fixing upon the price structure of producers in other states, however, is not the criterion. The test is whether the regulation and the price fixing amounts to a regulation of interstate commerce and places a burden upon it. If it does, it is beyond the power of the state and cannot be sustained. The effect of a state statute fixing prices as applied to a sale in interstate commerce is tersely stated by Justice Cardozo in Highland Farms Dairy, Inc. v. Agnew, 81 L. Ed. 514; 518 (1936) as follows: "Highland in Washington may sell to High in Virginia and High may buy from Highland, at any price they please."

However desirable it may be for the Pennsylvania Milk Control Board to stabilize the dairy industry, and however necessary it may be for it to regulate the transactions of the defendant and other buyers of milk similarly engaged to effect this purpose, we conclude that the effect of the present statute would be to regulate and to place a burden upon interstate commerce.

Under the terms of the case stated it is therefore necessary that judgment be entered in this case in favor of the defendant and that the plaintiff's bill be dismissed at the cost of the plaintiff.

[fol. 37] CONCLUSIONS OF LAW

1. All of the transactions of the defendant including the purchase of milk from the Pennsylvania farmer-producers, within the Commonwealth of Pennsylvania, constitute interstate commerce.

2. The regulations sought to be imposed upon the defendant by the plaintiff, including the taking out of a license as

provided by the Act of April 28, 1937, posting a bond conditioned for the payment of all amounts due to farmers under the Act and under orders of the Milk Control Commission, and to pay such milk prices to the farmers as is required by the Commission would constitute a regulation of and a burden upon interstate commerce.

3. The defendant, in its operations as described in the Case Stated, is not subject to the jurisdiction or control of the Milk Control Commission of the Commonwealth of Pennsylvania in the matters complained of by the plaintiff.

DECREE

And Now, August 23, 1937, upon consideration of the foregoing case, it is ordered, adjudged and decreed that judgment therein shall be entered in favor of the defendant as stipulated in the Case Stated, and that the plaintiff's bill of complaint be and the same is hereby dismissed at the cost of the plaintiff.

It is further ordered that the Prothonotary shall enter the above decree nisi and give notice of the entry thereof to the parties or their counsel of record, and if no exceptions [fol. 38] be filed thereto by either party within ten days after such notice is given, the decree entered nisi shall be entered as an absolute decree.

By the court.

(S.) W. C. Sheely, P. J., Judicial District, 51st, Specially Presiding.

IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

STIPULATION AS TO TIME FOR FILING EXCEPTIONS

And Now, August 30 1937, it is stipulated and agreed by and between Thomas Caldwell, attorney for the defendant, and Gilbert S. Parnell, Special Deputy Attorney General, and Charles J. Ware, Assistant Deputy Attorney General, attorneys for the plaintiff that, due to the absence from the Commonwealth of Pennsylvania until September 10, 1937 of Harry Polikoff, Deputy Attorney General in charge of this case for the plaintiff, the date within which to file exceptions, if any, to the adjudication and decree of the court shall be extended to September 20, 1937, subject to the approval of the court and the decree nisi entered August 23,

1937 shall not become absolute unless the plaintiff fails to file exceptions on or before September 20, 1937.

Thomas D. Caldwell, Attorney for Defendant; Gilbert S. Parnell, Special Deputy Attorney General; Charles J. Ware, Assistant Deputy Attorney General, Attorneys for the Plaintiff.

[fol. 39] In Court of Common Pleas of Dauphin County

Order Extending Time

And Now, August 31, 1937 the above stipulation is approved and time within which to file exceptions is extended to September 20, 1937.

W. C. Sheely.

In Court of Common Pleas of Dauphin County

Plaintiff's Exceptions to Adjudication and Decree

And Now, to wit, this twentieth day of September, 1937, the plaintiff, by its counsel Harry Polikoff, Deputy Attorney General does file the following exceptions to the conclusions of law, adjudication and decree in the above captioned case:

1. Plaintiff excepts to the learned chancellor's first conclusion of law, which reads:

"1. All of the transactions of the defendant including the purchase of milk from the Pennsylvania farmer-producers, within the Commonwealth of Pennsylvania, constitute interstate commerce."

2. Plaintiff excepts to the learned chancellor's second conclusion of law, which reads:

"2. The regulations sought to be imposed upon the defendant by the plaintiff, including the taking out of a license as provided by the Act of April 26, 1937, posting a bond conditioned for the payment of all amounts due to farmers under the Act and under orders of the Milk Control Commission, and to pay such milk prices to the farmers as is [fol. 40] required by the Commission would constitute a regulation of and a burden upon interstate commerce."

3. Plaintiff excepts to the learned chancellor's third conclusion of law, which reads:

"3. The defendant, in its operations as described in the Case Stated, is not subject to the jurisdiction or control of the Milk Control Commission of the Commonwealth of Pennsylvania in the matters complained of by the plaintiff."

4. Plaintiff excepts to the learned chancellor's decree nisi, which is as follows:

"And Now, August 23, 1937, upon consideration of the foregoing case, it is ordered, adjudged and decreed that judgment therein shall be entered in favor of the defendant as stipulated in the Case Stated and that the plaintiff's bill of complaint be and the same is hereby dismissed at the cost of the plaintiff."

Respectfully submitted, Harry Polikoff, Deputy Attorney General.

[fol. 41] In Court of Common Pleas of Dauphin County

Opinion

This matter is before us on exceptions filed by the plaintiff to the Conclusions of Law and Decree Nisi filed by the Chancellor in the above matter. The case was before the Chancellor on a Case Stated which submitted the following questions:

1. Is the defendant wholly engaged in interstate commerce?

2. Is the defendant under the circumstances above set forth required to take out a license as a milk dealer within the provisions of the act known as the Milk Control Board Law, approved April 30, 1935, P. L. 96 (reenacted by the Act of April 28, 1937, No. 105) and generally comply with the provisions of said Act or any part thereof including the orders issued thereunder?

The Chancellor determined that all of the transactions of the defendant within the Commonwealth of Pennsylvania constituted interstate commerce, and that the regulation sought to be imposed by the plaintiff, including the taking

out of a license, posting a bond conditioned for the payment of all amounts due to farmers under the Act and under orders of the Milk Control Commission, and to pay such minimum prices to the farmers as is required by the Commission would constitute a regulation of and a burden upon interstate commerce, and that the defendant, in its operations as described in the Case Stated, is not subject to the jurisdiction or control of the Milk Control Commission of the Commonwealth of Pennsylvania in the matters com- [fol. 42] plained of by the plaintiff. It is to these Conclusions of Law that the plaintiff now excepts.

The facts agreed upon in the Case Stated are that the defendant operates a milk-receiving plant within the Commonwealth of Pennsylvania at which it buys milk brought to the plant by the farmer-producers. The milk is weighed and tested by the defendant and is then dumped into receiving tanks where it is cooled for the sole purpose of preventing the growth of bacteria during shipment. Within a period of twenty-four hours after the milk is received at the plant it is shipped to New York City in tank trucks operated for the defendant, for resale in that city.

Before the Chancellor the plaintiff based its right to require the defendant to submit to its jurisdiction upon the theory that the contract between the Pennsylvania farmers and the defendant consisted of an offer and an acceptance, which contract was completely performed by both parties within the Commonwealth of Pennsylvania and was entirely an intrastate transaction. It further contended that even if the defendant were engaged wholly in interstate commerce the regulation sought to be imposed by the state was a valid exercise of its police power, and that such power rises above the right of the federal government to control interstate commerce or, at least, exists until the federal government exercises some control over the subject matter. The plaintiff does not now press the first theory but insists that the regulation sought to be imposed is a valid exercise of the police power, and that such power is superior to the power of the federal government over interstate commerce and that the regulation sought to be imposed by the plaintiff [fol. 43] was threefold: (1) to require the defendant to be licensed; (2) to require the defendant to post a bond; (3) and to require the defendant to pay certain prescribed prices. The plaintiff contends that the Chancellor should

at least have sustained the Commonwealth upon the subjects of licensing and bonding.

The plaintiff contends that the Chancellor erred in relying upon the Farmers Grain Company cases, 258 U. S. 50 (1921) and 268 U. S. 189 (1924), and that these cases were virtually overruled by Townsend v. Yeomans, 81 L. Ed. 840 (May 24, 1937), which reaffirmed Munn v. Illinois, 94 U. S. 113 (1876), and other like cases cited by the plaintiff.

We have carefully re-examined the opinions in Townsend v. Yeomans, Munn v. Illinois, and the other cases cited by the plaintiff, and cannot agree that these cases govern the present situation. "In Munn v. Illinois, 94 U. S. 113, the question was whether, as respects an elevator devoted to storing grain for hire, the state could regulate the storage charge where part of the grain reached the elevator, or was destined to leave it, through the channels of interstate commerce. The court held such a regulation admissible because of the public character of the elevator, and because interstate commerce was affected only incidentally and remotely. No restriction on buying or shipping was involved. In W. W. Cargill Co. v. Minnesota, 180 U. S. 452, the court had before it a state statute, much of which had been pronounced unconstitutional by the state court. In sustaining a provision which remained, the court said, p. 470: 'The statute puts no obstacle in the way of the pur-[fol. 44] chase by the defendant company of grain in the state, or the shipment out of the state of such grain as it purchased.' Plainly the case is not in point here. In Merchant Exch. v. Missouri, 248 U. S. 365, the statute involved required that public weighers appointed for the purpose should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any other person from issuing weight certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that, as applied to grain received from or shipped to points without the state, it burdened interstate commerce. Of course the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire, like the statute considered in Munn v. Illinois." Shafer v. Farmers Grain Co., 268 U. S. 189 (1924).

In Budd v. New York, 143 U. S. 517 (1891), also relied upon by the plaintiff, the court considered a statute fixing the maximum charge for elevating, receiving, weighing and

discharging grain at elevators and warehouses almost exactly as in Munn v. Illinois. The statute had no relation whatever to the purchase or sale of grain. In Brass v. North Dakota, 153 U. S. 391 (1893) the statute under consideration regulated grain warehouses and the weighing and handling of grain, requiring public warehousemen to give bond to the state, fixing rates of storage, and requiring warehousemen to carry insurance. Here, too, there was no restriction or regulation or buying or selling, and the effect on interstate commerce was only incidental and remote.

[fol. 45] In Townsend v. Yeomans, 81 L. Ed. (1937), the Supreme Court was considering an act of the Legislature of Georgia prescribing the maximum charges which could be made by warehousemen for the handling of tobacco. Under the method of handling tobacco in Georgia, the tobacco is brought to the warehouses by the seller and there sold to buyers who immediately ship the tobacco to other states. Payment for the tobacco is made to the warehouseman who deducts his charges and remits the balance to the sellers. The act had no relation whatever to the buying and selling of tobacco and was distinguished by the Supreme Court from the Farmers Grain Company cases by showing that the "Georgia Act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of the warehousemen for their services to the growers in handling and selling the tobacco for their account. Whatever relation these transactions had to interstate and foreign commerce, the effect is merely incidental and imposes no direct burden upon that commerce."

The distinction between Munn v. Illinois, Townsend v. Yeomans, and the other cases relied upon by the plaintiff, on the one hand, and the Farmers Grain Co. cases and the present case, on the other, lies in the fact that in the former the regulation was confined to warehouses, elevators, or other agencies through which interstate commerce might flow, but whose activities were entirely intrastate. In the latter cases the statutes sought to regulate the act of purchasing articles which were to be shipped in interstate com-

[fol. 46] merce, and to prohibit such purchases unless made upon terms prescribed by the statute or by administrative agencies. It is not the milk-receiving plant operated by the

defendant that the plaintiff seeks to regulate, but the business conducted by the defendant of buying and shipping milk. The very purpose of the Milk Control Law of Pennsylvania as stated in Section 101 of the Act is "regulating and controlling the milk industry in this Commonwealth, for the protection of the public health and welfare and for the prevention of fraud."

There is a vast difference in the effect upon interstate commerce of a statute regulating a warehouseman or grain elevator through whose hands interstate commerce passes, and a statute regulating and controlling the purchase of a commodity and the transportation thereof in interstate commerce. Townsend v. Yeoman's does not overrule, directly or indirectly, the Farmers Grain Company cases, but is distinguished from those cases in exactly the same manner as is Munn v. Illinois. In Shafer v. Farmers Grain Co., 268 U. S. 189 (1924), the North Dakota statute under consideration provided, among other things, that every buyer operating a grain elevator must obtain a yearly license, the fee for which was to be adjusted to the capacity of the elevator, and required those operators who do not pay cash in advance to file with the supervisor a sufficient bond to secure payment for all wheat bought on credit, and to keep records of all purchases. In Lemke v. Farmers Grain Company, 258 U. S. 50 (1921), the Act provided that purchases of grain could be made only by those who held licenses from the state, pay state charges for the same, and act under a system of grading, etc. defined in the Act, and that grain could only be pur- [fol. 47] chased subject to the power of the inspector to determine the margin of profit which the buyer should realize upon his purchase.

It was contended in the Farmers Grain Company cases, as it is contended here, that the regulations could stand upon the principle which permits the state to make local laws under its police power in the interest of the welfare of its people, which are valid although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the states. It was held that this principle has no application where the state passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it, and that a state statute which, by its necessary operation, directly

interferes with or burdens such commerce, is a prohibited regulation and invalid regardless of the purpose with which it was enacted.

Undoubtedly, the state in the exercise of its police power may enact statutes the effect of which upon interstate commerce is indirect and incidental, and until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective. Hartford Accident and Indemnity Company v. Illinois, 298 U. S. 155 (1936). But when the attempted exercise of the police power amounts to a direct regulation of interstate commerce, and directly places a burden thereon, it is invalid. The Pennsylvania Legislature in adopting the Milk Control Law of 1937 recognized this principle. In Section 1201 it provided that no provision [fol. 48] of the Act shall apply, or be considered to apply to foreign or interstate commerce, except in so far as the same may be effective in accordance with the constitution of the United States and the laws of Congress enacted pursuant thereto.

On its facts the present case cannot be distinguished from the Farmers Grain Company cases, 258 U. S. 50 (1921) and 268 U. S. 189 (1924). On the authority of those cases the regulation sought to be imposed upon the defendant by the plaintiff is beyond the power of the state and cannot be endorsed. The exceptions to the Chancellor's conclusions of law must be dismissed and the decree nisi entered as a final decree.

And Now, December 7, 1937, the plaintiff's exceptions to the conclusions of law are dismissed and the decree nisi is directed to be entered as a final decree.

By the Court in Banc.

(Signed) W. C. Sheely, P. J. Fifty-first Judicial District, Specially Presiding.

And Now, December 7, 1937, an exception to the foregoing order and to the final decree is noted for the plaintiff.

By the Court.

(Signed) W. C. Sheely, P. J.

[fol. 49] 284

IN SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, MAY TERM, 1938

No. 22

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA, Appellant,

v.

EISENBERG FARM PRODUCTS, A Pennsylvania Corporation

Appeal from decree of the Court of Common Pleas of Dauphin County

OPINION OF THE COURT

KEPHART, C. J.:

Before passing on the questions presented to the court below as to whether the legislature may, through the Milk Control Law, prescribe certain regulations such as licensing, bonding and minimum prices for producers or dealers in the milk industry, effective where the product is purchased and destined for interstate commerce, we must first decide whether these provisions are valid police regulations under our Constitution. If they are not, then the questions under the commerce clause of the Federal Constitution need not be considered.

We have held in Colteryahn Sanitary Dairy v .Milk Control Commission, and Keystone Dairy Co. v. Milk Control Commission, appeals 6, May Term 1938, and 38, May Term, 1938, that the Act of January 2, 1934, P. L. 174, and the Acts of April 30, 1935, P. L. 96, and April 28, 1937, P. L. 417 amending and reenacting its provisions, are constitutional. See Rohrer v. Milk Control Board, 322 Pa. 257, where it was held that licensing and price-fixing had a direct and substantial relation to sanitation, public health and public welfare. While bonding was not specifically mentioned, it was listed and necessarily included as it was one of the questions in the case. It was conceded at the argument in the present case that the Court could take judicial notice of the fact that licensing and bonding do bear a necessary relation to the preservation and continuation of an adequate [fol. 50] supply of pure milk, a necessary article of food in

the State, and are in the interest of sanitation and public health.

These provisions are also a protection against the danger of fraud to the producer and public so well described by President Judge Keller in Rohrer v. Milk Control Board, supra. Such regulations, tending to prevent strikes and the dumping of the product on the market, harmful to the public; to provide a fair price and secure its payment, are necessary to prevent cutting off the supply to the public and to assure its purity and necessary quality. With this end in view the bonds are required as securities for the extension of credit by producers, to prevent fraud and imposition on them, and to eliminate irresponsible and dishonest dealers who are a constant menace to the consuming public. Bonding is therefore related to this legitimate purpose, which is a proper exercise of the police power. Moreover, this Court has held that the legislature may constitutionally require bonds in other industries affected with a public interest to secure payment to subcontractors, mechanics, laborers and materialmen, because of the very elements of fraud prevention, and the inability, otherwise, of those to be benefited to procure payment or credit. See the opinion of Justice Simpson, in Commonwealth v. Great American Indemnity Co., 312 Pa. 183, at 196.

The court below has adequately covered in its opinion all questions involved, and has passed on the Federal issues under the decisions of the Supreme Court of the United States. The portion of the opinion relating thereto is printed in the Reporter's Note. While we have felt, and still feel, that state laws regulating transactions incidental to interstate commerce, but designed to protect the health, safety, or welfare of the public, are proper state regulation where the transaction which is the origin and beginning of the commerce, is peculiarly within the state's domain, the Supreme Court of the United States in the case of DiSanto v. Pennsylvania, 273 U. S. 34, and other cases has held that such regulations are a burden on interstate commerce and [fol. 51] that the states are forbidden to legislate thereon even though the Federal Government has taken no steps to protect the public from the danger of fraud. The Commonwealth earnestly argues that the effect of these decisions should be changed. We are controlled by them on matters affecting interstate commerce.

Decree affirmed at appellant's cost.

[fol. 52] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION FOR REHEARING AND REARGUMENT

To the Honorables, the Justices of Said Court:

The petition of the Milk Control Board of the Commonwealth of Pennsylvania (now Milk Control Commission), appellant in the above case, by Guy K. Bard, Attorney General, Harry Polikoff, Deputy Attorney General, and Charles J. Ware, Assistant Deputy Attorney General, respectfully prays your Honorable Court to grant a rehearing and reargument, for the following reasons:

I

Questionable Authority of DiSanto v. Pennsylvania

Your Honorable Court, in the opinion in the instant case, regards the position of the appellant with favor in endeavoring to sustain a state law regulating transactions incidental to interstate commerce, but designed to protect the health, safety and welfare of the public, where the transaction which is the origin and beginning of the commerce, is peculiarly within the state domain. However, the opinion further states that your Honorable Court is controlled on [fol. 53] matters affecting interstate commerce by the decision of the United States Supreme Court in Di Santo v. Pennsylvania, 273 U. S. 34 (1927), which holds that such regulations are a burden on interstate commerce, and that the states are forbidden to legislate thereon even though the Federal Government has taken no steps to protect the public from the danger of fraud.

The appellant respectfully submits that the majority opinion of the United States Supreme Court in this case was founded on misapprehension and error in the application of the facts to the legal principles involved, and that today Di Santo v. Pennsylvania stands overruled, if not in terms at least in effect, by subsequent decisions of the same court.

Mr. Justice Butler, speaking for the court, states that the case is controlled by Texas Transport Co. v. New Orleans, 264 U. S. 150, and McCall v. California, 136 U. S. 104. Mr. Justice Brandeis, dissenting, makes this pertinent observation regarding the McCall case (page 41):

"• • • Disregard of the McCall case would not involve unsettlement of any constitutional principle or of any rule of law, properly so called. It would involve merely refusal to repeat an error once made in applying a rule of law—an error which has already proved misleading as a precedent. While the question whether a particular statute has the effect of burdening interstate or foreign commerce directly presents always a question of law, the determination upon which the validity or invalidity of the statute depends, is largely or wholly one of fact. • • •

"• • • The human experience embodied in the doctrine of stare decisis teaches us, also, that often it is better to follow a precedent, although it does not involve the declaration of a rule. This is usually true so far as concerns a [fol. 54] particular statute whether the error was made in construing it or in passing upon its validity. But the doctrine of stare decisis does not command that we err again when we have occasion to pass upon a different statute. In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. This course seems to me imperative when, as here, the decision to be made involves the delicate adjustment of conflicting claims of the Federal Government and the States to regulate commerce. The many cases on the Commerce Clause in which this Court has overruled or explained away its earlier decisions show that the wisdom of this course has been heretofore recognized. In the case at bar, also, the logic of words should yield to the logic of realities."

Thus most serious questions were raised at the time the Di Santo case was first decided in the dissenting opinions of Justices Brandeis and Stone, in the first of which Justice Holmes concurred.

In declaring the Pennsylvania statute unconstitutional as a direct burden on foreign commerce, the majority opinion of the court summarily disposed of the entire question of state regulation with this statement of the law (page 37):

"• • • A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. • • • Such legis-

lation cannot be sustained as an exertion of the police power of the State to prevent possible fraud. * * * The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. * * *"

[fol. 55] Your petitioner respectfully urges that in the light of more recent pronouncements of the United States Supreme Court this statement cannot be fairly said to reflect the present status of the law in this regard.

In South Carolina vs. Barnwell Bros., 82 L. ed. 469, decided in February, 1938, the court held constitutional a South Carolina statute which prohibited the use of that state's highways to motor trucks whose width exceeded 90 inches, and whose weight exceeded 20,000 pounds. The Interstate Commerce Commission was one of the original complaining parties, and the trial court made findings, not assailed on appeal, that a large amount of motor truck traffic passing inter-state in the southeastern part of the United States, which would normally pass over the highways of South Carolina, would be barred from the state by the restrictions, if enforced. It further found that compliance with the weight and width limitations, would seriously impede motor truck traffic passing to and through the state and increase its costs. Furthermore, the state road system constituted a connected system of highways which were improved with the aid of Federal money grants, as part of a National system of highways. In holding that these regulations were not an unreasonable burden on interstate commerce, the court at page 474, per Mr. Justice Stone, held:

"But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to make measures to insure the safety

and conservation of their highways which may be applied to like traffic moving intrastate. * * * The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate [fol. 56] and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse."

The earnest attention of your Honorable Court is directed to the following language from the same opinion for comparison with the law as set forth in the Di Santo case (pages 476, 477):

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

"Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581, supra; Stephenson v. Binford, 287 U. S. 251, 272, 77 L. ed. 288, 298, 53 S. Ct. 181, 87 A. L. R. 721."

"* * * This is equally the case when the legislative power is one which may legitimately place an incidental

burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for legislative judgment. * * *"

[fol. 57] Thus, under this most recent statement of the court, it is now held that the commerce clause operates of its own force to curtail state power in some measure, but it does not forestall all state action affecting interstate commerce, and the test is whether the state legislation of local concern is in point of fact aimed at interstate commerce, or by necessary operation is a means of gaining a local benefit by throwing burdens on those without the state. Further, in the absence of national legislation, especially covering the subject, the state may rightly prescribe uniform regulations adapted to promote safety, applicable alike to interstate and intra-state commerce.

The regulations prescribed by this Commonwealth in respect to milk control, conform to those requirements in every instance. The licensing and bonding requirements, as applied to dealers, cannot distinguish between milk moving intra-state or interstate in Pennsylvania; nor are there Federal regulations in existence which might overlap to cover this type of commerce. There can be no distinction between the promotion of safety, as the term is used by Mr. Justice Stone, and proper concern for the preservation of health and the suppression of fraud—objects of milk control legislation favorably passed upon in this respect by the Supreme Court of the United States in Nebbia v. New York, 291 U. S. 502, and your Honorable Court in Rohrer v. Milk Control Board, 322 Pa. 257 (1936), recently reiterated by Mr. Chief Justice Kephart in Colteryahn Sanitary Dairy v. Milk Control Commission, and the opinion in the instant case (decided July 1, 1938).

In concluding this phase of the petition for rehearing your petitioner respectfully submits the decision in the [fol. 58] Barnwell case, supra, renders the Di Santo case obsolete, incorporates the principles of law set forth in the dissenting opinion of Mr. Justice Brandeis, and re-establishes as law the opinion of this Honorable Court written by his Honor, Mr. Chief Justice Kephart.

II

North Dakota Farmers Grain Company Cases Overruled by Townsend vs. Yeomans

The appellant respectfully submits that the trial court in the original opinion, through misapprehension and error, predicated its decision on the cases of Lemke v. Farmers Grain Co., 258 U. S. 50, and Shafer v. Farmers Grain Co., 268 U. S. 189, the holdings in which cases have been impliedly overruled by Townsend vs. Yeomans, 81 L. ed. 840, The original doctrine of Munn v. Illinois, 94 U. S. 113, was thus re-established by the decision in the Townsend case, the opinion referring at length to the Munn case, and other similar cases, squarely following them.

The Illinois statute construed in Munn v. Illinois, supra, required a license, a bond and maximum charges for the storage and handling of grain. The Georgia statute upheld by the court in Townsend vs. Yeomans (supra) fixed maximum charges for handling and selling leaf tobacco. In both instances a large portion of the product, i. e. grain and tobacco, moved into the channels of interstate commerce.

The similarity between the provisions of these statutes and the salient features of the Milk Control Law of this Commonwealth will be readily apparent to your Honorable Court, and we submit that the trial court misapprehended the present position of the United States Supreme Court by [fol. 59] basing a conclusion primarily on the Farmers Grain cases (supra).

III

Decision in Baldwin v. Seelig Not Applicable in Determination of the Instant Case

The appellee in its brief strongly relies on the decision in the case of Baldwin v. Seelig, 294 U. S. 511 (1935), to support its contention that the Commonwealth's milk regulations are a direct interference with interstate commerce.

The appellant submits that on its facts the Baldwin case has no application to the case at bar.

In that case the question raised was whether the State of New York could fix the price to be paid by New York milk dealers to producers in Vermont, for milk produced and purchased in Vermont and sold in New York.

The Supreme Court of the United States very properly ruled that New York could not regulate the price paid for milk purchased in Vermont. As applied to the facts in the present case this simply means that New York cannot impose upon the appellee, purchasing milk in Pennsylvania, the regulations which Pennsylvania is seeking to enforce.

The appellant respectfully urges that the statements in the Baldwin opinion in respect to burdens on, and interferences with commerce, must be read in the light of the unusual and drastic regulations which New York sought therein to impose.

Therefore, in consideration of the foregoing matters, the Milk Control Commission prays that a reargument be [fol. 60] granted in the above captioned case in order that the grave matters of public concern and the issues of law above specified may be reconsidered by your Honorable Court.

And it will ever pray, etc.

(Signed) Guy K. Bard, Attorney General. (Signed) Harry Polikoff, Deputy Attorney General. (Signed) Charles J. Ware, Assistant Deputy Attorney General.

Dated Harrisburg, Pa., July 13, 1938.

In accordance with the rules of court, there are attached hereto a copy of the opinion written by the Honorable Mr. Chief Justice John W. Kephart, of the Supreme Court of Pennsylvania; and the adjudication and final decree written by the Honorable W. C. Sheely, specially presiding in the Court of Common Pleas of Dauphin County. Copies of all the briefs used in the argument by all parties accompany this petition.

Respectfully submitted, (Signed) Charles J. Ware, Assistant Deputy Attorney General.

[fol. 61] IN SUPREME COURT OF PENNSYLVANIA

ORDER DENYING REARGUMENT—July 25, 1938

Reargument refused.

Per Curiam.

[fol. 62] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION TO HOLD RECORD PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable the Justices of the said Court:

Your petitioner respectfully represents:

1. That your petitioner is the Milk Control Commission of the Commonwealth of Pennsylvania.

2. That the above appeal, terminated adversely to petitioner by your Honorable Court, involves a grave question of public concern, namely, whether or not the licensing and bonding provisions of the Milk Control Law are in conflict with the commerce clause of the United States Constitution, as being a burden on interstate commerce.

3. That your petitioner previously filed with your Honorable Court a petition for reargument in said cause, said petition being refused by your Honorable Court on July 25, 1938.

4. That your petitioner desires, because of the aforesaid grave question of public concern involved in this cause, to have the decision of your Honorable Court reviewed by the Supreme Court of the United States, and in pursuance thereof will take immediate action to present the matter to said Court.

5. Your petitioner desires the entire record in said case to be retained by the Prothonotary of the Middle District of Pennsylvania until this action can be completed.

[fol. 63] Wherefore, your petitioner prays that your Honorable Court grant an order on said Prothonotary, directing him to hold said record pending the disposition of the application of your petitioner in this appeal.

Guy K. Bard, Attorney General. Harry Polikoff, Deputy Attorney General. (Signed) Charles J. Ware, Assistant Deputy Attorney General.

[fol. 64] IN SUPREME COURT OF PENNSYLVANIA

ORDER HOLDING RECORD

And Now, this 29th day of July, 1938, upon consideration of the foregoing petition, it is hereby ordered that the record in the above case be held for thirty days unless before that time an appeal be allowed or refused in the application to be instituted in this matter.

Per Curiam.

[fol. 65] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION TO EXTEND TIME FOR HOLDING RECORD PENDING APPEAL TO SUPREME COURT OF THE UNITED STATES

To the Honorable the Justices of the said Court:

The petitioner, appellant herein, through its counsel Guy K. Bard, Attorney General, Harry Polikoff, Deputy Attorney General, and Charles J. Ware, Assistant Deputy Attorney General, respectfully represents:

1. That on July 29, 1938, pursuant to petition filed in the above named cause, your Honorable Court directed the Prothonotary to hold the record in the above captioned case for a period of thirty days pending an appeal to the Supreme Court of the United States.

2. That in accordance with the rules of the Supreme Court of the United States the appellate procedure required herein is by petition to the Supreme Court of the United States for a Writ of Certiorari.

3. That such procedure requires the printing of certain records; preparation and printing of a petition for a Writ of Certiorari; preparation and printing of a brief in support of such petition, and the issuance of process by the Supreme Court of the United States requiring your Honorable Court to certify the record hereof to said court for review thereon.

4. That it is impossible to complete the aforesaid procedure within the period of thirty days as hitherto allowed [fol. 66] in the order of your Honorable Court.

Wherefore, your petitioner prays that said order directing the Prothonotary to hold the record of the above captioned case for a period of thirty days be extended to provide for the holding of said record an additional sixty days.

Guy K. Bard, Attorney General. Harry Polikoff, Deputy Attorney General. (Signed) Charles J. Ware, Assistant Deputy Attorney General.

[fol. 67] In Supreme Court of Pennsylvania

Order Extending Time for Holding Record

And Now this 1 day of Sept. 1938, upon consideration of the foregoing petition, it is hereby ordered that the record in the above case be held by the Prothonotary for an additional sixty days as prayed for.

Per Curiam.

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] Supreme Court of the United States

Order Allowing Certiorari—Filed November 21, 1938

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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